IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 683...

BERTRAM M. WACHTEL,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL W. ALTMAN,
Counsel for Petitioner.

ADAMS PRESS, 82 Beekman Street, New York City. WOrth 2-0061

INDEX

Table of Cases Cited

OTHER AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

BERTRAM M. WACHTEL,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Bertram M. Wachtel, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on August 8th, 1944 (petition for rehearing denied and order filed on October 10, 1944).

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (L. Hand, Swan and Chase, Circuit Judges) has not as yet been reported.

NOTE: All figures in parentheses refer to pages of transcript of record filed by Cohen and Raffe in the Circuit Court of Appeals, unless otherwise indicated. Italics ours.

Jurisdiction

The order for mandate of the United States Circuit Court of Appeals for the Second Circuit was entered October 18, 1944, after denial of petition for rehearing. The jurisdiction of this Court in invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934. Excluding Sundays and legal holidays (October 22-29; November 5-7-12-19), time for filing the petition extends to November 23, 1944.

Questions Presented

1. Did the Trial Judge err in submitting to the jury the question of petitioner's guilt as to the substantive counts of the indictment (except counts 10, 11, 12, 16, 17 and 29, withdrawn by the Government at the close of the case), charging violation of Title 18, Section 338, United States Code, where the evidence showed misjoinder of offenders and offenses, not only in respect to persons, but also as to times, places and subject-matter, requiring different proof, in view of the conflict of decisions in the various Circuits (*Coco* v. *United States*, 289 Fed. 33; *United States* v. *Tufanelli*, 131 F. (2d) 890, 893, 894; *United States* v. *Twentieth Century Bus Operators*, 101 F. (2d) 700); and under the rule of *McElroy* v. *United States*, 164 U. S. 76, and *United States* v. *Smith*, 112 F. (2d) 83, 85 (C. C. A. 2)?

2. Did the Trial Judge err (even under the rule of *United States* v. *Berger*, 2 Circ., 73 F (2d) 278, reversed on other grounds in 295 U. S. 78) in submitting to the jury the question of petitioner's guilt as to the single, general

conspiracy laid in the indictment against all 75 defendants, (thirtieth count), where the evidence failed to show such single conspiracy, but showed, instead, a large number of separate, dissimilar, different and unrelated acts and conspiracies, many of them committed prior to the effective date of the Statute of Limitations, and/or outside the jurisdiction of the Trial Court; and all committed by small and varying groups of defendants and other persons not named in the indictment, or by defendants or others acting alone and independently?

3. Did the Trial Judge err in refusing timely requests to withdraw from the jury overt acts charged in the indictment and generally unproved, or unproved as to petitioner; as well as overt acts alleged to have been committed prior to the effective date of the Statute of Limitations (Overt Acts 1, 2, 3, 4 and 29); and in then instructing the jury, in his charge, that proof of any one overt act was sufficient to convict?

4. Did the Trial Judge err in submitting to the jury the question of petitioner's guilt as to the first count of the indictment, where the evidence failed to establish that the crime charged was within the jurisdiction of the Trial Court, in violation of his constitutional rights under Article 3, Section 2, Clause 3, of the Constitution, and the Sixth Amendment? *Mackett* v. *United States*, 90 F. (2d) 462.

5. Did the Trial Judge err in charging the jury that acts committed *outside the State of New York* (rather than outside the Southern District of New York) were not within the jurisdiction of the Trial Court, where the evidence disclosed a number of acts and conspiracies committed by various defendants in various Districts of the State of New York and outside the Southern District? *Sixth Amendment of the Constitution.*

6. Did the Trial Judge err in refusing to withdraw from the consideration of the jury, as to all defendants on trial, false representations charged in the indictment as to which no proof had been adduced, and, as to petitioner, false representations which did not and could not have any possible application to him or to the question of his guilt; and then instructing the jury, in the charge, that proof as to any one false representation was sufficient to convict?

7. Did the Trial Judge err, during the cross-examination of a Government witness, in instructing the jury to disregard the factual content of questions propounded unless such facts were independently proved, meanwhile stating to counsel that such content might be untrue; and then, upon cross examination of a defendant as to whether he had employed former convicts (where the prosecutor specifically set forth the nature of the crimes, persons involved, dates and places), refusing to similarly instruct the jury, with the explanation, as to the prosecutor, that "being a sworn officer of the law, he would speak rather carefully"; where such criminal records were not proved nor even attempted to be independently proved, throughout the trial? *Wigmore*, Sec. 980, sub. 5; *United States* v. *Nettl*, 121 F. (2d) 927.

8. Did the Trial Judge err in charging the jury that they might, if they wished, consider whether the testimony of accomplices had been corroborated by documentary evidence or "by physical circumstances which are proved in the case," where the whole record was bare of any corroborating evidence, documentary or otherwise, connecting petitioner with the crimes so testified to? *Erber* v. *United States*, 234 Fed. 221; *Renda* v. *United States*, 56 F. (2d) 601; *Sykes* v. *United States*, 204 Fed. 909, 913; *Lett* v. *United States*, 15 F. (2d) 686, 690; *Arnold* v. *United States*, 94 F. (2d) 499, 507, 508.

9. Was petitioner deprived of a fair and speedy trial, as guaranteed by the Constitution (a) when the misjoinder of offenders and offenses and the consequent variance was so extensive as to result in a trial of seven months' duration, testimony covering over 16,000 pages, and 4,000 exhibits; (b) when an accomplice, of utterly depraved character and a long criminal record, admitting that he was fighting for his own liberty and concededly animated by hatred of petitioner, testified as a government witness for six weeks against various defendants including petitioner, not only as to the crimes charged but as to irrelevant matters reflecting on the morals of petitioner, on innumerable occasions applying vile epithets to the defendants, *i.e.*, fagins, murderers, etc.; all without any serious effort by the Trial Court to restrain him, but even with the support of the Trial Judge; (c) when such testimony, as well as that of other accomplices, was not, as to petitioner, in any wise corroborated; (d) when the remarks of the Trial Judge were for the most part so partisan, conflicting, meaningless, misleading and confusing as to be repugnant to the most ordinary concepts of fairness to the defendants; (e) when both the Trial Judge and the prosecutor admitted that it was impossible to remember testimony that has gone before; and (f) when the Trial Judge excluded all questions by counsel on cross examination as to previous testimony of witnesses unless counsel referred to the transcript of the testimony by page and quotation, and counsel had not such transcript, being unable to purchase it, thereby depriving defendants, including petitioner, of the right of full cross examination of witnesses?

Statutes Involved

Title 18, Section 338 of the United States Code, insofar as it applies here, provides as follows:

> "Section 338: Whoever, having devised or intending to devise any scheme or artifice to defraud,

or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1000, or imprisoned not more than five years, or both."

Title 18, Section 88 of the United States Code, provides as follows:

"Section 88. If two or more persons conspire either to commit any offense against the United States or defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Title 18, Section 557 of the United States Code, provides as follows:

"Section 557. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in

separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Article 3, Section 2, Clause 3 of the Constitution of the United States, provides as follows:

> "Section 2. (3) The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

Article VI (Sixth Amendment) of the Constitution of the United States, provides as follows:

> "Article VI. In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 28, Section 391 of the United States Code, provides as follows:

> "Section 391. All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Statement

Petitioner was one of 75 defendants charged in an indictment filed September 30, 1938, in the District Court for the Southern District of New York, charging all defendants with a single scheme to defraud by false representations and use of the mails (first twenty-nine counts), in violation of Title 18, Section 338 of the United States Code, and with conspiracy to commit said offenses (thirtieth count), in violation of Title 18, Section 88 of the United States Code. After a trial lasting seven months, in which over 16,000 pages of testimony were taken and 4000 exhibits put in evidence, the case was submitted to the jury as to all counts except counts 10, 11, 12, 16, 17 and 29, which had been withdrawn by the Government; and petitioner was found guilty as to counts 1, 5, 6, 7, 18, 20, 22, 23 and 25 (substantive counts) and 30 (conspiracy). He was sentenced to serve consecutive terms of imprisonment of five years on count 1 and two years on count 30, as to which he was also fined $5,000. As to the other counts sentence was suspended and probation fixed. The judgment was affirmed by the Court below.

The indictment, by its substantive counts, charged all 75 defendants with a scheme to defraud some 90 named persons, and others to the grand jury unknown, by fraudulently inducing them to give up money and property in return for lands, gas interests, stock in various companies, leases, etc.; further, that a number of firms were organized, trusts set up, trustees appointed; further, that at least 41 false representations were made; further, that investment advisory services were set up, "boiler rooms" operated, returns to certificate holders manipulated, offices established by 23 firms at 35 locations in New York, Boston and Philadelphia; and that in each case, for the purpose of executing said scheme, a letter was mailed to a named person. Count 30, the conspiracy count, set out 29 overt

acts, of which overt acts 1, 2, 3, 4 and 29 were alleged to have been committed more than three years prior to the filing date of the indictment. Thus, all defendants were charged with one general scheme to defraud, and with all acts in pursuance thereof, including the mailings; and with one common conspiracy.

The trial which followed this all-inclusive indictment can only be described as a mass trial of a number of defendants for a vast number of unrelated and generally dissimilar crimes, perpetrated over a period from 1920 to 1941 (although the indictment alleged the inception of the conspiracy in 1932 and its continuance until 1938, when the indictment was filed). The Trial Judge stated that it was possibly the longest jury trial in the history of the world (12,726) and was the equivalent of 50 or 60 ordinary cases (4328). Because of its length the Court established a novel rule, that witnesses on cross examination could be checked only by line and page of their former testimony, and not from memory, because, as the Court explained, "nobody can recall what he said, for human memory is not of that quality" (7936). After only five weeks of the trial, the Court questioned the ability of the jury to absorb the facts (499). The prosecutor, in his summation, conceded he could not remember the facts (12,323, 12,336). Hundreds of transactions were testified to, between some defendants themselves, or defendants and others not named in the indictment, with some 150 alleged victims, many also not named in the indictment. Most of the testimony related to isolated activities of single defendants, or of limited groups having no relation to any other defendants (4328); also to activities of groups of defendants who had pleaded guilty and were not on trial, and others as to whom the trial had been severed or the indictment dismissed. There was no evidence of any scheme involving all defendants named or on trial, or of any single conspiracy involving all defendants named or on trial or convicted. In spite of

this, all evidence was admitted as to all defendants, and so submitted to the jury, after a forty-five minute charge, composed largely of legal platitudes and erroneous statements of law.

The Government sought to prove its case against petitioner by two classes of witnesses:

(a) *Alleged victims*, who testified to solicitations, representations, sales and exchanges made by various defendants and others not named in the indictment. Many of these transactions had been completed prior to the effective date of the Statute of Limitations, and many were outside the jurisdiction of the Trial Court; all of these transactions were either with small groups of defendants and/or other persons, or with individuals acting independently. Yet all were admitted generally against all defendants on trial.

Space limitations forbid a detailed description of many of these individual and "small group" acts, schemes and conspiracies. The few described here will, however, serve as excellent illustrations of the variety of joinders under the guise of one scheme and one conspiracy.

Mildredth M. Gast testified to the sale to her of six or seven royalties by one Fogelson, a defendant not on trial, at her home in Massachusetts; that some time later another defendant, Philip Smith, called on her and induced her to turn over some of these royalties to him for appraisal, which she did. Smith, however, transferred them to defendant Sam Meyers. Upon learning of this, Fogelson advised her to have transfer stopped, which she attempted to do, but too late. Later Smith called again and left with her a lease as security pending the return of these royalties to her. Subsequently, a partial settlement was made with her by Smith through her attorney. No connection shown between Fogelson and Smith, or between Fogelson and Meyers, or with any other defendant in these transactions, which took place wholly in Massachusetts.

Frederick L. Richards, not named as a "victim" nor in any "mail" count, testified that he purchased land and royalties from defendant Grow; that Philip Smith later called and made a number of sales to him over a long period, and also borrowed money from him either in person or through his brother, Moses J. Smith, and that this continued to the date of filing of the indictment. Here again, no connection between Grow and the Smiths, or with any other defendant, on transactions also wholly in Massachusetts.

Blanche G. Klimm testified as to sales by defendants Mussman, Finn and S. Freeman, of stock in a company controlled by defendant Raffe, all in Massachusetts and all more than three years prior to date of filing of indictment, and even before Mussman, according to his own testimony, ever did business with petitioner; here again, no connection with any other defendant in these transactions.

In the testimony of the "victim" witnesses there was not a scintilla of proof of one general scheme to defraud or one common conspiracy, as charged in the indictment. And not one of them connected petitioner by his or her testimony.

(b) *Accomplices,* of unsavory reputation and prison record, especially one of them, Mussman, who testified for six weeks at random and at will, uncurbed by the Court, branding the defendants with vile names, *i. e.,* fagins, murderers, crooks, etc., admitting a life of crime and perjury, admitting that he was fighting for his own liberty, and admitting animus against petitioner because the latter had refused to help him while in prison and had, in his opinion, been instrumental in bringing about his arrest. His testimony was contradictory in and of itself, and was in most particulars contradicted by the testimony of the other accomplices. He refused to answer questions at will, and employed every subterfuge when he desired to avoid answers. He insulted counsel. His testimony went far

afield from the charges in the indictment, and became a history of his checkered career of crime. Neither his testimony, nor that of the other accomplices, was in the slightest corroborated by any other proof in the case.

The Court finally permitted Mussman to use his own discretion in his testimony (1136; 1157), saying that the epithet "fagins" was a mere figure of speech and not harmful. He stated on some occasions that the witness was trying to be truthful; and that he corroborated himself by repetition of his testimony. He made every effort to bolster the testimony of this hardened criminal. He admitted hearsay evidence, with a novel explanation as to this type of evidence, that "the truthfulness of the contents of the conversation is for the jury to determine" (1006-7).

Space forbids greater detail as to the many errors and improprieties which characterized this trial; nor does the writer deem it necessary for purposes of the writ prayed for.

Specification of Errors to Be Urged

The Court below erred as follows:

1. In sustaining the judgment of conviction.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence, on grounds of material variance in the indictment and the proof, and on grounds that petitioner did not receive the fair and speedy trial guaranteed by the Constitution.

3. In failing to reverse the judgment of the District Court for its error in overruling petitioner's motion in arrest of judgment.

4. In failing to reverse the judgment of the District Court for its error in admitting improper evidence.

5. In failing to reverse the judgment of the District Court for its error in improperly instructing the jury.

6. In failing to reverse the judgment of the District Court for remarks and conduct prejudicial to petitioner and depriving him of his constitutional right to a fair and impartial trial.

REASONS FOR GRANTING THE WRIT

I

Did the Trial Judge err in submitting to the jury the substantive counts of the indictment (except those withdrawn by the government), where the evidence showed a misjoinder of offenders and offenses, not only in respect to persons, but also as to time, places and subject matter, requiring different proof in each case, under the rule of the *McElroy* and *Smith* cases, and in view of the conflict of decision in the various circuits?

The Trial Court denied all motions, frequently and continuously made throughout the trial, to limit testimony as to the many misjoined schemes and conspiracies, to the defendants alleged to be involved in each; and submitted the case to the jury on the theory that *all* of the testimony was binding on *all defendants* on trial, however unconnected with them or with the charges contained in the indictment. Furthermore, he made no reference whatsoever to questions of misjoinder in his charge, except as to the portion thereof quoted in Reason II hereof.

The Court below, however, in its opinion, acknowledged "the fact that the confederates were not the same in all" of the schemes proved; and also acknowledged the conflict of decision in the various Circuits as to whether joinder was permissible under such circumstances.

This conflict of authority hinges on varying interpretations of Title 18, Section 557, United States Code, on joinder of crimes in one indictment, and consolidation of indictments.

One line of cases stemming from *Coco* v. *United States*, 289 Fed. 33 (C. C. A. 8), which has been consistently followed in the Eighth and other Circuits, holds that joinder of offenses under Section 557 is improper when the defendants are different. *Cf. Nazorro* v. *United States*, 56 F. (2d) 1026 (C. C. A. 10).

The Fifth Circuit, however, while asserting such joinder to be bad practice, has sustained it when the facts relied on to convict all defendants are the same. *Todd* v. *United States*, 48 F. (2d) 530, 532 (C. C. A. 5).

The Seventh Circuit, also criticising the practice, has nevertheless, by a divided Court, permitted joinder when the counts in the indictment charged "closely related offenses." *United States* v. *Tufanelli*, 131 F. (2d) 890, 893-4 (C. C. A. 7). The vigorous dissenting opinion seems to announce a rule far sounder in principle than that of the majority.

The Court below cited the *Coco* and *Tufanelli* decisions, stating that it held opposite to the *Coco* rule in *United States* v. *Twentieth Century Bus Operators*, 101 F. (2d) 700; but in that case the Court merely held that it could not decide whether the claimed variance had prejudiced the defendants *because of the fact that the evidence had not been brought up on the appeal and was not before it.* More to the point in the Second Circuit is *United States* v. *Smith*, 112 F. (2d) 83, 85, where the Court said, referring to Section 557:

> "While unlimited use of this statute should not be tolerated in the name of convenience alone, consolidation should be permitted when, as here, the charges are so closely connected that all the evidence produced in Court would have been admissible if any one of the indictments had been brought to trial alone."

Applying, in the light of these words, the theory of the Court below in the instant case that "the problem is strictly speaking rather one of joinder under Section 557," not by the widest stretch of interpretation or reasoning could it be asserted that all the evidence produced at the instant trial would have been admissible on a trial of any one or any small group of defendants involved in any one of the hundreds of small schemes and conspiracies shown by the evidence, if standing alone in an indictment. Thus, even by the rule of the *Smith* case, where the question was fully considered, the type of joinder demonstrated by the instant case should have been condemned.

The foregoing cases cite the oft-quoted case of *McElroy* v. *United States*, 164 U. S. 76, which held against consolidation of indictments naming different persons and charging crimes "committed at different times and not provable by the same evidence." The rule of that case, consistently followed in some Circuits, and qualified and extended in others, although all purport to accept its reasoning, requires, it is submitted, either clarification or re-emphasis at the hands of this Court, to the end that the uncertainty created by the varying interpretations of the rule shall not become hopeless.

II

Did the Trial Judge err in submitting to the jury the single, general conspiracy charged, on proof alone of a vast number of unrelated smaller conspiracies involving varying groups of defendants, and independent individual frauds, of which many were barred by the statute of limitations and/or wholly committed outside the jurisdiction of the Trial Court?

To sustain the propriety of such proof in support of the charge in the indictment, the lower Court relied upon the rule of *Berger* v. *United States*, 295 U. S. 78, reversing

on other grounds 73 F. (2d) 278 (C. C. A. 2). In that case, the proof showed two schemes rather than the one charged in the indictment, with one conspirator common to both and the subject-matter the same differing only in the purpose of the schemes, namely, in one case to utter counterfeit money, and in the other to pass it; it was held that as the variance did not affect the substantial rights of the accused, it was not material.

The lower Court in the *Berger* case pointed out as two "good instances of how on occasion the variance may prove material" the situations arising, respectively, in the case of *United States* v. *Siebricht*, 59 F. (2d) 976, 978 (C. C. A. 2), where the variance deprived defendant of the defense of the Statute of Limitations, and in *Dowdy* v. *United States*, 46 F. (2d) 417 (C. C. A. 4), where he was deprived of the defense that one of the conspiracies proved was outside the jurisdiction of the Trial Court. The test of materiality was announced by the Court in the following words (280):

> "The materiality of a variance does not depend upon the degree of its logical perversity, but upon how far it throws confusion into the trial and makes it likely to miscarry. * * * Will it allow the production of evidence not competent or material to the crime he has committed, though admissible against another defendant tried at the same time?"

In sustaining the lower Court on the point of materiality of variance, this Court stated that it was thus giving effect to Section 269 of the Judicial Code, as amended (28 U. S. C. Sec. 391), to end "the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless." This Court clearly acknowledged the possibility of material variance under such circumstances, in stating (p. 83):

> "We do not mean to say that a variance such as that here dealt with might not be material in a different case."

In its opinion in the instant case, the lower Court stated that the rule of the *Berger* case is "now well settled law." The question here, therefore, is whether the facts of the instant case fall within the rule of materiality announced therein, and within the examples of materiality cited therein in the *Siebricht* and *Dowdy* cases, *supra*.

In the *Berger* and *Siebricht* cases there was proof of *two* conspiracies as against the one charged; in the *Dowdy* case, *three*. In the instant case there were *upwards of a hundred schemes* proved, differing not slightly but fundamentally, having neither common subject-matter, time, place, personnel or method. Many of them were barred by the Statute of Limitations and/or outside the jurisdiction of the Trial Court, squarely within the rules of the *Siebricht* and *Dowdy* cases; many involved no use of the mails whatsoever, and many no use of the mails by petitioner or anyone allegedly connected with him. Wrongs committed by other defendants throughout their lives, as well as by accomplice witnesses for the government, not bearing upon the charges against petitioner, and all incompetent and immaterial as to him, were paraded for months before the jury, and *all were admitted into evidence as binding on petitioner*. The prejudice to petitioner, built up in this way with the full and express sanction of the Trial Court, was inescapable and substantial, and finally reached a point where no defendant, and certainly no petitioner, could hope for a determination of the issue of his guilt upon the merits. He was deprived of meritorious defenses to most of the smaller schemes and frauds proved, and most of the evidence was not competent or material to the crimes charged against him. It is submitted, therefore, that the instant case falls squarely within the definition and examples of material variance announced and cited in the *Berger* case.

In the face of proof of the many unconnected smaller conspiracies and individual acts referred to *supra*, the following was all that the Trial Court had to say on the subject of proof of multiple conspiracies, in its charge to the jury:

> "If you find that a defendant was engaged in one conspiracy but the proof goes further and shows one or more other conspiracies, the additional evidence adduced in no way prejudices the defendant if the indictment sufficient (sic) informed the defendant as to what proof he would be required to meet upon the trial and the government has shown beyond reasonable doubt a relationship between the conspiracies.
>
> "If you find that a defendant has been engaged in a conspiracy which is stated in detail in the indictment he cannot be said to be any less guilty if additional proof is produced of another conspiracy in which he is not involved but which is related.
>
> "Where the allegations of the indictment charge a conspiracy and the proof adduced shows that a defendant was engaged in that conspiracy and goes further to show one or more additional conspiracies, the defendant is in no way harmed because of the additional evidence, if the government has adequately informed the defendant what proof he would be called upon to meet upon the trial."

The Trial Court did not explain what he meant by the words "related" and "relationship between the conspiracies"; nor does the writer know whether he meant relationship in point of time, subject-matter, place, persons involved or anything else; nor, it is submitted, could the jury have any way of knowing. If we eliminate these vague and meaningless words, we find that the only test of materiality of a variance, according to the Trial Court, was whether the indictment or the government had "adequately informed the defendant what proof he would be called to meet upon the trial." This, of course, is no test

at all. For even assuming that petitioner was so informed, no variance later appearing in the proof could become material, under the *Berger* case. Thus, the Trial Court charged in effect that a variance could *never* become material from the nature of the proof itself. It is submitted that such instructions not only ignored the well-settled law of the *Berger* case, but applied a new test of materiality of variance; and such instructions, to which due exceptions were noted, was serious error, as was the Trial Court's denial of motions for dismissal and a directed verdict of acquittal, made at the close of the Government's case and of the whole case, on the ground of the material variance created by the proof.

III

Did the Trial Judge err in refusing timely requests to withdraw from the consideration of the jury overt acts charged in the indictment and generally unproved or unproved as to petitioner; as well as overt acts alleged to have been committed prior to the effective date of the statute of limitations (overt acts 1, 2, 3, 4 and 29); and then instructing the jury, in his charge, that proof of any one overt act was sufficient to convict?

The following is all that the Trial Judge had to say in his charge as to overt acts:

> "The thirtieth, or conspiracy, count is framed under another Federal statute which provides in substance that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each shall be guilty of an offense against the United States. The essence of the offense is the conspiracy, but the statute requires that there be some overt act in furtherance thereof to

> give it life. The indictment alleges twenty-nine of these overt acts, but it was not necessary for the government to prove them all. There is evidence in the case with respect to many of them, and *a finding by the jury on any one is sufficient.*"

Had the proof showed the one general conspiracy charged in the indictment, the foregoing instruction, vague and abstract as it was, might have sufficed, if the Trial Court had withdrawn from the consideration of the jury (1) overt acts charged and wholly unproved (and the Government conceded that it had not proved all of the overt acts charged), (2) as to petitioner, overt acts relating to smaller conspiracies with which he was in no wise connected, or even claimed to be connected, and (3) overt acts charged in the indictment to have been committed before September 30, 1935, the effective date of the Statute of Limitations.

The proof, however, did not establish one general conspiracy, as the Court below conceded; and appropriate motions were made for the withdrawal of such overt acts both at the close of the Government's case and at the close of the whole case, and denied, to which exception was duly taken (12228-12272).

There could be no justification in law for the refusal to withdraw acts wholly unproved. *Cody* v. *United States*, 73 F. (2d) 180, 183. In view of the complexity and prolixity of the indictment, such withdrawal became imperative.

As to acts proved against some defendants, and not others, such refusal could be justified only if the evidence showed the one general conspiracy charged, on the theory that all conspirators were bound by the acts of each. No one of the overt acts charged could have been in furtherance of all of the conspiracies proved. Under such circumstances, it was error for the Court to permit the jury to convict, if they so chose, one group of defendants on proof of an overt act relating to another conspiracy involving another group. *United States* v. *Groves*, 122 F. (2d) 87, 91.

Serious as these errors are, the trial record and the opinion below present another situation in this connection, which not only demands reversal but has also so unsettled the prevailing law as to the effective date of the Statute of Limitations in conspiracy cases, as to require the prompt intervention of this Court: The indictment laid five (not four, as the opinion below states) overt acts before September 30, 1935, or three years before the filing of the indictment (overt acts 1, 2, 3, 4 and 29). Motions for withdrawal of these acts from the jury were timely made, and denied.

There could be no justification in law for such refusal by the Court. It is clear that in the light of the Trial Court's charge that proof as to any one overt act was sufficient for conviction, the jury was permitted to convict, if they so chose, on the basis of one of these overt acts so barred. *United States* v. *Siebricht, supra; Lonabaugh* v. *United States*, 179 Fed. 476; *McWhorter* v. *United States*, 299 Fed. 780; *Brown* v. *Elliott*, 225 U. S. 392, 401.

The Court below stated that this error "raises the only really important doubt in the whole trial"; and after acknowledging that there is "undoubted authority" for the proposition that the Statute of Limitations runs from the last overt act found, rejected the possibility of conviction on the basis of one of these acts so barred, as too remote. "Against that purely theoretical chance," however, the Court arrived at a novel conclusion of law: That the Statute of Limitations runs from the date of termination of the whole conspiracy by abandonment or success, rather than from the date of the last overt act.

To arrive at this conclusion the Court below acknowledged but brushed aside the authority of the various Circuits, approved in *Brown* v. *Elliott*, *supra*, and turned for support of its conclusion to *Kissel* v. *United States*, 218 U. S. 601, *which was a case under the Sherman Act, where*

no overt act is necessary, as the Court below conceded. It saw no distinction in principle between such a case and cases under Title 18, Section 88, where an overt act must be proved. The Court reasoned that since "the conspiracy, not the overt act, is the 'gist' of the crime," the principle of the old doctrine is that it causes the crime of conspiracy to end as soon as it begins, which is "de facto absurd," and that it identifies the conspiracy with the act; further, that "the practical consequences of such a doctrine would be most serious: conspirators would secure immunity if they agreed to seek cover, and awaited a propitious moment to resume their activities."

It is submitted that the principle sustained by uniform past authority in cases under Section 88 is neither absurd, nor are its possible practical effects as alarming as the Court below suggests, for the following reasons: (1) By its language, Congress clearly intended that the overt act be an element of the crime of conspiracy under the section; and as the act cannot precede the agreement, that the crime become complete with the commission of the overt act or acts done to effect the object of the conspiracy. (2) The requirement of an overt act does not necessarily cause the crime of conspiracy to end as it begins, unless the agreement and the act are simultaneous; but even if this were so, there is nothing more absurd about it in principle than in the case of many other crimes, *i. e.*, assault, burglary, libel, etc., which may begin and end at the same time. (3) Identification of the agreement of conspiracy with the act, to make the crime complete, is just what Congress intended by the language of Section 88. (4) While there may be a series of acts following the agreement, the crime is complete with the performance of the first overt act, which is binding on all conspirators, and does not "require revival by some later step." (5) The practical consequences feared by the Court, as stated *supra*, do not follow; for once the agreement is made and the overt act performed, each con-

spirator is subject to prosecution therefor. (6) If the Court meant that conspirators might seek cover after they had entered into the agreement and before any overt act had been committed, and be immune during such period, this is so; but again, this is precisely what the framers of Section 88 intended; for it was clearly their intention that conspirators should not be liable for the agreement alone, unless and until they did something to effectuate it.

It is submitted that to extend the effective date of the Statute of Limitations to the date of termination of the whole conspiracy, in cases under Section 88, would throw the whole law on this point, uniformly applied in the various Circuits, and heretofore approved by this Court, into hopeless confusion and ambiguity, creating a clear conflict of decision in the various Circuits; and that if this Court should reject such modification, under the cases following the rule of the *Lonabaugh* case, *supra*, the refusal of the Trial Court to withdraw overt acts unproved or barred by the statute requires reversal of the conviction on the conspiracy count.

Conclusion

This petition does not attempt to present to this Court the following questions, briefly stated: (a) whether the Trial Judge erred in submitting Count 1 to the jury, in the absence of evidence that the crime was within the jurisdiction of the Trial Court; (b) whether the Trial Judge erred in extending, in effect, the jurisdiction of the Trial Court to all of the Federal Districts of the State of New York; (c) whether the Trial Judge erred in refusing to withdraw from the jury false representations charged but unproved as to all defendants, or as to petitioner alone; (d) whether the Trial Judge erred and abused his discretion in placing the prosecutor on a higher plane of good faith than counsel for the defendants, in spite of the latter's persistent "show

of proof" as to facts unproved; (e) whether the Trial Judge erred in his charge as to corroborating evidence; and (f) whether petitioner was deprived of the fair and speedy trial guaranteed by the Constitution, under the circumstances of the instant case.

The three questions submitted are considered sufficient, in the belief of petitioner, to warrant the granting of this petition for a writ of certiorari. The writ should be granted.

Respectfully submitted,

SAMUEL W. ALTMAN,
Counsel for Petitioner.

No. 683

IN THE

Supreme Court of the United States

BERTRAM M. WACHTEL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR LEAVE TO FILE CERTIFIED TYPEWRITTEN RECORD

SAMUEL W. ALTMAN,
Counsel for Petitioner.

ADAMS PRESS, 82 Beekman Street, New York City. WOrth 2-0061

IN THE

Supreme Court of the United States

BERTRAM M. WACHTEL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

BERTRAM M. WACHTEL, by his petition herein, prays for an order permitting the filing of a typewritten record herein as certified by the Circuit Court of Appeals for the Second Circuit, and for permission to proceed on his application for a writ of certiorari herein and in future proceedings on appeal to this Court, on the typewritten record sought to be filed by Joseph Cohen, likewise certified, as appears from the application of said Joseph Cohen, made simultaneously herewith.

1. Petitioner was one of seventy-five persons named in a thirty count indictment charging in the first twenty-nine counts, a scheme and artifice to defraud by use of the mails, in violation of Title 18, Section 338, U. S. Code, for the period from January 1, 1932, down to September 30, 1938, the date of its filing, and count 30, a conspiracy to violate the mail fraud statute in the manner alleged in Count 1. (Title 18, Section 88, U. S. Code.)

2. Of the seventy-five persons indicted, twenty-eight pleaded guilty before trial; as to nineteen, the trial was severed; as to one, the indictment was dismissed before trial. Of the remaining twenty-seven brought to trial on August 5, 1941, thirteen pleaded guilty during the course of the trial, the case was dismissed by consent as to one, and of the remaining thirteen, eleven were convicted and two acquitted. Of those convicted, five have appealed.

3. Counts 10, 11, 12, 16, 17 and 29 were withdrawn from consideration by the jury and petitioner was found guilty on Counts 1, 5, 6, 7, 18, 20, 22, 23, 25 and 30, and sentenced to five years on Count 1; 2 years on Count 30, to run consecutively, and fined $5,000.00. Sentence was suspended on Counts 5, 6, 7, 18, 20, 22, 23, 25 and petitioner placed on three year probation.

4. The trial took seven months, and the stenographer's minutes number 16,000 pages. The exhibits number over 4000 (Government's and defendants').

5. Your petitioner and the other four defendants who appealed were released on bail pending its determination.

6. Several records on appeal were filed by the several appellants. Cohen and Raffe filed a joint record of 12,000 pages. Petitioner filed a record of 83 pages. Rosenberg filed a record of about 613 pages and Rogoff a record of about the same number of pages. All records filed were typewritten, by permission of the Circuit Court of Appeals, after showing made. Three copies of the typewritten record were filed. By stipulation and order of the Circuit Court of Appeals, the original stenographic minutes (16,000 pages) were filed. By further stipulation and order, petitioner was permitted to adopt the record filed by Cohen and Raffe for purpose of appeal.

7. The appeal was perfected, and a printed brief of 82 pages was filed on behalf of petitioner by permission of the Circuit Court of Appeals.

8. The conviction was affirmed, L. HAND, Circuit Judge, writing a twenty-five page opinion.

9. Thereafter, a petition for rehearing was duly filed, and the application denied.

10. Thus petitioner seeks certiorari on the grounds set forth in the petition for certiorari filed simultaneously herewith.

11. Petitioner's financial status is and was, as follows:

During the course of the trial your petitioner was without sufficient funds to meet his obligation to his trial counsel and, of necessity, borrowed from friends and relatives, some of which loans are still unpaid.

12. Your petitioner was married October 11, 1942, and in September 1943, petitioner's wife started The Wachtel Company at 1107 Broadway, New York City, dealing in costume jewelry with an investment of $6,500.00, which business your petitioner manages and receives a salary of $125 per week, which with deductions leaves $102 per week net. Other than as aforesaid, your petitioner has no assets.

13. Thus it may be seen that your petitioner is not a legal pauper, yet is without funds or assets sufficient to finance the printing necessary herein, namely, 16,000 pages —the stenographer's transcript plus 4000 exhibits, which your petitioner is informed would cost in excess of $40,000.00.

WHEREFORE, petitioner prays that he be relieved of the necessity of complying with the rules of this Court concerning the filing of the record in this case, and that the application to file the typewritten record as certified by the Circuit Court of Appeals for the Second Circuit and filed in this Court be granted; and that petitioner be permitted to proceed on his application for a writ of certiorari herein and in future proceedings on appeal to this Court, on the typewritten record sought to be filed by Joseph Cohen, likewise certified, as appears from the application of said Joseph Cohen, made simultaneously herewith, and that said typewritten record as so certified by the Circuit Court of Appeals for the Second Circuit and filed in this Court, be deemed to constitute the record for the petitioner herein; and for such other relief as may be proper in the premises.

BERTRAM M. WACHTEL,
Petitioner.

State of New York,
City of New York,
County of New York, } ss.:

BERTRAM M. WACHTEL, being duly sworn, deposes and says: that he is the petitioner herein, that he has read the foregoing petition, and knows the contents thereof and that the same is true to his own knowledge; except as to the matters alleged to be made upon information and belief and as to those matters he believes them to be true.

BERTRAM M. WACHTEL.

Sworn to before me this 8th day of November, 1944.

SELIG LENEFSKY,
Notary Public, ~~New York~~ Queens County.